

DEC 7 1968

JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

October Term, 1968

No. 413

STATE OF NORTH CAROLINA,

WARDEN R. L. TURNER,

Petitioner

vs.

CLIFTON A. PEARCE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 16, 1968
CERTIORARI GRANTED OCTOBER 28, 1968**

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STATE OF NORTH CAROLINA,

WARDEN R. L. TURNER,

Petitioner

vs.

CLIFTON A. PEARCE,

Respondent.

RELEVANT DOCKET ENTRIES

- (1) June 16, 1966. Judgment in the case of STATE v. CLIFTON A. PEARCE, 6 June 1966, Two-Week Criminal Conflict Session, Superior Court of Durham County, Durham, North Carolina.
- (2) November 3, 1966. Docketing of Appeal in the Supreme Court of North Carolina in the case of STATE v CLIFTON A. PEARCE, from the Two-Week Criminal Conflict Session, Superior Court of Durham County, Durham, North Carolina.
- (3) December 14, 1966. Opinion of the Supreme Court of North Carolina in the case of STATE v CLIFTON A. PEARCE, affirming the trial and judgment of the appeal in said case from the Superior Court of Durham County, Durham, North Carolina.
- (4) March 7, 1967. Application by Clifton A. Pearce for Writ of Habeas Corpus and Affidavit in Forma Pauperis

filed in the United States District Court for the Eastern District of North Carolina, Raleigh Division, Raleigh, North Carolina.

- (5) March 20, 1967. Return to Habeas Corpus and Return to Show Cause filed by the respondent, State of North Carolina in the case of STATE v CLIFTON A. PEARCE, in the United States District Court for the Eastern District of North Carolina, Raleigh Division, Raleigh, North Carolina.
- (6) March 28, 1967. Proof of Service and Answer for Respondents, State of North Carolina, and Warden R. L. Turner, in opposition to Petition for Writ of Habeas Corpus and Answer to Petition and Motion to Dismiss filed by the respondents in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, in the United States District Court for the Eastern District of North Carolina, Raleigh Division, Raleigh, North Carolina.
- (7) November 20, 1967. Memorandum Opinion and Order signed by Algernon L. Butler, United States District Judge, in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, No. C-1973.
- (8) November 30, 1967. Memorandum Opinion and Order signed by James H. Pou Bailey, North Carolina Superior Court Judge, in the case of STATE OF NORTH CAROLINA v CLIFTON A. PEARCE, in the Superior Court of Durham County, Durham, North Carolina.
- (9) February 2, 1968. Writ of Habeas Corpus signed by Algernon L. Butler, United States District Judge, in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, No. C-1973.
- (10) March 1, 1968. Notice of Appeal to the United States Court of Appeals for the Fourth Circuit filed by the State of North Carolina and Warden R. L. Turner.
- (11) June 19, 1968. Opinion of the United States Court of

Appeals for the Fourth Circuit, in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA and WARDEN R. L. TURNER, No. 12,256.

- (12) June 19, 1968. Judgment of the United States Court of Appeals for the Fourth Circuit in the case of CLIFTON A. PEARCE v STATE OF NORTH CAROLINA and WARDEN R. L. TURNER.
- (13) June 28, 1968. Motion of the State of North Carolina and Warden R. L. Turner for Stay of Mandate pending certiorari filed in the United States Court of Appeals for the Fourth Circuit.
- (14) July 10, 1968. Order of the United States Court of Appeals for the Fourth Circuit Staying Mandate pending application of the State of North Carolina and Warden R. L. Turner for certiorari.
- (15) August 16, 1968. Petition for Certiorari filed in the Supreme Court of the United States by the State of North Carolina and Warden R. L. Turner.
- (16) October 28, 1968. Certiorari granted.

JUDGMENT IN THE CASE OF STATE v. CLIFTON A. PEARCE, 6 JUNE 1966, TWO-WEEK CRIMINAL CONFLICT SESSION, DURHAM SUPERIOR COURT

On Thursday morning, June 16, 1966, the following judgment was entered by the Court:

THE COURT: It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. **IT IS THE JUDGMENT** of this Court that the defendant be confined to the State's Prison for a period of eight years.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 1973 CIVIL

CLIFTON A. PEARCE

v.

ORDER

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER

THIS CAUSE coming on to be heard upon the application of Clifton A. Pearce, a state prisoner, for a writ of habeas corpus, the court finds the following facts:

That the petitioner was convicted by a jury at the May, 1961 term of the Superior Court of Durham County, of assault with intent to commit rape and was given a sentence of 12 to 15 years; that the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina¹ because of the use of an involuntary confession at his original trial; that petitioner was retried at the June, 1966 term of the Superior Court of Durham County, and convicted by a jury of assault with intent to commit rape; that in sentencing petitioner at the new trial, the trial judge stated that it was his intention to give the petitioner a sentence of fifteen years, but he was taking into consideration the time already served, and therefore sentenced him to eight years; that the petitioner appealed his conviction to the North Carolina Supreme Court² which affirmed his conviction; that the petitioner sought a post-conviction hearing in February of 1967 which was denied.

Petitioner alleges, *inter alia*, that he received a harsher sentence at his retrial and therefore the second sentence is void under the decision of *Patton v. State of North Carolina*.³ With this contention we must agree. The eight year sentence

petitioner received at his second trial gives him more than full credit for time served on the maximum length of the original sentence, but it does not give full credit on the minimum length of the original sentence.⁴ Now therefore, based upon the present record before this court, it is ORDERED AND ADJUDGED:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this court in the Federal Building, Raleigh, North Carolina, within ten days after service of this order, a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

This November 17, 1967.

/s/ Algernon L. Butler
Chief Judge, U. S. District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Norma G. Blackman
Deputy Clerk

¹ State of North Carolina v. Clifton A. Pearce, 266 N.C. 234, 145 S.E. 2d 918.

² State of North Carolina v. Clifton A. Pearce, 268 N.C. 707, 151 S.E. 2d 571.

³ Patton v. State of North Carolina, 381 F. 2d 636 (1967).

⁴ Patton v. Ross, 267 F. Supp. 387 (E.D.N.C. 1967), Hall v. Stallings, Civ. No. 1811, Raleigh Division (E.D.N.C. 1967).

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 1967, I served a copy of the foregoing order upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and a copy upon the petitioner, Clifton A. Pearce, North Carolina Central Prison, 835 West Morgan Street, Raleigh, North Carolina, by depositing the same in the United States mail, postage prepaid, in envelopes addressed respectfully to each at their respective addresses.

SAMUEL A. HOWARD, Clerk
United States District Court

By Norma G. Blackman
Deputy Clerk

NORTH CAROLINA
DURHAM COUNTY

IN THE
SUPERIOR COURT

STATE OF NORTH CAROLINA)

v.)

CLIFTON A. PEARCE)

ORDER

This cause comes on to be heard pursuant to an Order dated the 17th of November, 1967 filed the 20th of November, 1967 in the United States District Court, Eastern District of North Carolina, and signed by the Honorable Algernon L. Butler, Chief Judge, United States District Court, Eastern District of North Carolina. The said Order provides as follows:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this Court in the Federal Building, Raleigh, North Carolina, within ten days after service of this Order a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this Order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this Court will entertain a motion on behalf of the petitioner for an order releasing him from

all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this Order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this Order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

An examination of the records relating to this case discloses the following:

That the defendant Pearce was indicted by the Grand Jury upon the capital charge of rape of a 12-year-old girl. He was tried by a jury at the May 1961 Session of the Superior Court of Durham County and was convicted of assault with intent to commit rape and was sentenced to twelve to fifteen years in the State's prison. Upon the same day he was transferred to Central Prison in Raleigh. That thereafter the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina, 266 N.C. 234; 145 S.E. 2d 918. That thereafter the petitioner was retried upon a new bill of indictment charging the petitioner with the crime of assault with intent to commit rape, the said bill of indictment having been returned at the March 1966 Session of Superior Court of Durham County. He was again convicted by a jury. At this second trial in passing sentence upon the defendant Pearce, the Trial Judge entered this judgment: "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the record available from the Prison Department that the defendant has served six years, six months, and seventeen days, flat and gain time combined, and the Court

in passing sentence in this case is taking into consideration the time already served by the defendant. It is the judgment of this Court that the defendant be confined in the State's prison for a period of eight years." That this conviction was appealed to the North Carolina Supreme Court. One of the questions raised on his appeal was his contention that the sentence given him at the second trial was in excess of that given him at his first trial. The Supreme Court of North Carolina affirmed his conviction. (268 N.C. 707; 151 S.E. 2d 571). Thereafter the petitioner sought by post-conviction hearing a new trial, which was denied.

The maximum punishment for the felony of assault with intent to commit rape in North Carolina is fifteen years.

The Court concludes the facts and the law in this case to be as follows:

~~The sentence at the second trial has been held by the Supreme Court of North Carolina to be properly and lawfully imposed under the law.~~

In this case the Federal District Court on a writ of habeas Corpus appears to assert that it will directly overrule the highest appellate court in the State of North Carolina on a specific question presented to and passed upon by the Supreme Court of North Carolina.

The Superior Court of North Carolina is the only Court in the State with the authority to sentence a person convicted for the felony of assault with intent to commit rape.

In this case the Federal District Court on a writ of habeas corpus is attempting by its Order to require the Superior Court of North Carolina to overrule the Supreme Court of North Carolina, and the Superior Court of North Carolina does not have such authority or power.

The writ of habeas corpus may not be used as a substitute for an appeal or writ of error.

Except for the original jurisdiction of the United States Supreme Court which flows directly from the Constitution, two prerequisites to jurisdiction must be present in the Federal Courts. First, the Constitution must have given the Courts the capacity to receive it, and second, an act of Congress must have conferred it.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to require the Superior Court of the State of North Carolina to act in this matter.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to direct the Superior Court of the State of North Carolina to act in opposition to a ruling of the Supreme Court of North Carolina.

This Court will not take or attempt to take action in direct contravention of the ruling of the Supreme Court of North Carolina.

The grounds upon which the Federal District Court is so ruling, or asserting that it will act is that a greater sentence was imposed upon a second trial. The Supreme Court of the United States has not ruled that this is unconstitutional. At least two of the United States Circuit Courts of Appeals have ruled in the following language: "A trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

The Order of the Federal District Court concedes that the petitioner is properly subject to imprisonment for his crime, and the Order of the Federal District Court (which is threatened in the present Order to be issued in sixty (60) days) which might result in the immediate release of the prisoner will be entirely contrary to law, and contrary to the proper administration of justice.

A copy of this Order is directed to be mailed to the following: Honorable V. Lee Bounds, Director, North Carolina Department of Correction; Honorable T. Wade Bruton, Attorney General of North Carolina; and Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District.

This the 30th day of November, 1967.

James H. Póu Bailey
Judge Presiding

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NORTH CAROLINA
 RALEIGH DIVISION
 No. 1973 — Civil

Clifton A. Pearce :

v. :

Writ of Habeas Corpus

State of North Carolina, :
 Warden R. L. Turner :

This cause coming on to be heard upon motion of Clifton A. Pearce for an order releasing him from restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape, and it appearing that an order was entered by this court on November 20, 1967, adjudging the said sentence imposed at the June 1966 session of the Superior Court of Durham County to be unconstitutional and void, and allowing the State of North Carolina sixty (60) days within which to impose a constitutional sentence, and providing further that if the State should fail to resentence the petitioner within the sixty (60) days prescribed, this court would entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of said sentence; and it further appearing to the court that on November 30, 1967, the Superior Court of Durham County entered an order electing not to resentence the petitioner in accordance with the option granted by this court, and that said period of sixty (60) days has expired; that the court is of the opinion that the State of North Carolina has been afforded a reasonable opportunity within the sixty (60) days prescribed to resentence petitioner to a maximum term of imprisonment of not less than 12 nor more than 15 years in the State's prison, subject to credit for the time served on the prior invalidated sentence; that if the State had elected to resentence and to impose the maximum constitutional sentence,

after allowance of the required credit, there would still remain approximately six years of petitioner's sentence yet to be served; that this court is reluctant to release petitioner until he has fully paid his debt to society, but it is left with no alternative; that the petitioner's present sentence has been adjudged unconstitutional and void, and the State has refused to impose a constitutional and valid sentence; Now, therefore,

It is ORDERED AND ADJUDGED as follows:

(1) That the respondents release immediately Clifton A. Pearce from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape.

(2) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, the petitioner; Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison.

(3) That the effectiveness of this writ is stayed for a period of thirty (30) days from the date of service hereof to permit the respondents to appeal if they be so advised.

This 1st day of February, 1968.

Algernon L. Butler
Chief Judge, United States District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Joyce W. Todd
Deputy Clerk

CERTIFICATE OF SERVICE

I have this date _____, 1968, served a certified copy of the above writ upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina.

United States Marshal

I have this date February 2, 1968, served a copy by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh North Carolina, the petitioner, Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison, Raleigh, North Carolina.

Samuel A. Howard, Clerk

Joyce W. Todd
Deputy Clerk, U. S. District Court

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 12,256.

Clifton A. Pearce,
Appellee,

versus

State of North Carolina and Warden R. L. Turner,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
ALGERNON L. BUTLER, CHIEF JUDGE.

(Submitted June 10, 1968. Decided June 19, 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

T. W. Bruton, Attorney General of North Carolina, Andrew A. Vanore, Jr., and Dale Shepherd, Staff Attorneys, Office of the Attorney General of North Carolina, on brief for Appellants, and Larry B. Sitton (Court-assigned counsel) and Smith, Moore, Smith, Schell & Hunter on brief for Appellee.

PER CURIAM:

The district court issued a writ of habeas corpus and ordered the release of petitioner for the reason that he had served the maximum term imposed on him at his original trial notwithstanding that on retrial, after successful post-conviction attack, he was sentenced to a longer term. The action was taken on the authority of our decision in *Patton v. North Carolina*, 381 F.2d 636 (4 Cir. 1967), *cert. den.*, *North Carolina v. Patton*, 390 U.S. 905 (1968).

In this appeal, the State of North Carolina frankly asks us to reconsider our decision in *Patton* in the light of cases considered therein which reached a contrary conclusion and subsequent decisions which have failed to follow it. This we decline to do; and because the issue on appeal is so narrow, we concluded to dispense with oral argument.

On the authority of *Patton*, the order of the district court is

Affirmed.

J U D G M E N T

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,256.

Clifton A. Pearce,

Appellee,

vs.

State of North Carolina and Warden R. L. Turner,

Appellants.

Appeal from the United States District Court for the - - -
 Eastern - - - District of - - - North Carolina.

This cause came on to be heard on the record from the
 United States District Court for the - - - Eastern - - - District
 of - - - North Carolina - - -, and was submitted on briefs.

On consideration whereof, It is now here ordered and
 adjudged by this Court that the judgment of the said District
 Court appealed from, in this cause, be, and the same is here-
 by, affirmed with costs.

Harrison L. Winter
 United States Circuit Judge.

Filed June 19, 1968

Samuel W. Phillips, Clerk

A True Copy, Teste:

Samuel W. Phillips, Clerk

By: Eleanor B. Howe, Deputy Clerk

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,256

CLIFTON A. PEARCE,

Appellee

v.

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,

Appellant

MOTION FOR STAY OF MANDATE

NOW COMES the Attorney General of the State of North Carolina, counsel for appellants State of North Carolina and Warden R. L. Turner herein, and respectfully shows the Court that on June 19, 1968 this Court filed an opinion affirming the District Court's finding that constitutional error had been committed in the sentence petitioner received at his retrial after his first trial had been set aside; that counsel for appellants State of North Carolina and Warden R. L. Turner intends to prepare and file in the United States Supreme Court a petition for a Writ of Certiorari for the purpose of obtaining a review of the constitutional questions decided adversely to appellants in this Court.

WHEREFORE, counsel for the State of North Carolina and Warden R. L. Turner prays that this Court stay-issuance of the mandate in this case, until such time as the Supreme Court of the United States shall render a decision upon the petition for Certiorari, and in the event that the writ of Certiorari is allowed by that Court, until the opinion of the Supreme Court of the United States is certified to this Court.

Respectfully submitted,

T. W. BRUTON
Attorney GeneralAndrew A. Vanore, Jr.
Staff Attorney

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,256.

Clifton A. Pearce,

Appellee,

vs.

State of North Carolina and
Warden R. L. Turner,

Appellant.

Appeal from the United States District Court for the Eastern
District of North Carolina, at Raleigh.

Upon the motion of the appellants by their counsel, and
for cause shown,

It is ordered that the mandate be, and it is hereby, stayed
pending application of the appellants in the Supreme Court
of the United States for a writ of certiorari to this Court,
provided the application is filed in the said Supreme Court
within 30 days from July 19, 1968.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Filed July 10, 1968
Samuel W. Phillips, Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By: Margaret P. Atkins
Deputy Clerk